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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1976

No. 76-1120

STATE OF CALIFORNIA DEPARTMENT OF BENEFIT PAYMENTS and STATE BOARD OF EQUALIZATION,

Petitioners,

vs.

JOHN M. ENGLAND, TRUSTEE IN BANKRUPTCY IN THE MATTER OF SHAKESTEERS COFFEE SHOPS, and UNITED STATES OF AMERICA,

Respondents.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Judgment of the Ninth Circuit Court of Appeals which the State of California asserts will be generally disruptive of bankruptcy administration is not a case of general or even wide application. Its ef-

fect is limited entirely to those particular circumstances where bankruptcy follows an unsuccessful debtor-relief proceeding and there are insufficient assets to defray the expenses necessary to liquidate, administer and close the ensuing bankruptcy proceeding. Under such circumstances the questioned decision holds that, to the limited extent necessary to pay such expenses, resort may be had to any administered property of the estate still properly within the jursidiction of the Court.

I.

UNITED STATES V. RANDALL HAS NOT BEEN MISAPPLIED

The reason and propriety for such payment is beyond question. Since 1952, §64 a(1) of the Bankruptcy Act (11 U.S.C. §§701 -799) has provided:

> "Where an order is entered in a proceeding under any Chapter of this Act directing that Bankruptcy be proceeded with, the costs

> and expenses of administration incurred in the ensuing bankruptcy proceeding,...shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such Chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any;"

When the above provision was enacted, the changes were described and discussed in Senate Report No. 1395, 82d Congress, 2d Session (1952) 4, as follows:

> "Unless provision is made for payment of the costs and expenses necessary to liquidate, administer and close the estate in the ensuing bankruptcy proceeding, ahead of all prior incurred and unpaid administration costs and expenses, there is always danger of a breakdown of administration. There should be assurance to the trustee in the ensuing proceeding that the costs and expenses incurred by him, such as bond and insurance premiums, costs of conducting a public sale and compensation for his services and for the services of his attorney, will be paid out of the assets liquidated and administered by him ahead of the prior unpaid costs and expenses."

This court previously has considered the scope and effect of this priority in United States v. Randall 401 U.S. 513 (1971) and in Otte v. United States 419 U.S. 43 (1974). In Randall, this court weighed the United States' assertion of priority under 26 U.S.C. 7501 as against §64a of the Bankruptcy Act, and concluded that the latter represented an "overriding statement of federal policy on this question of priorities." On page 516 of Randall this court notes:

> "Until 1926 claims for administrative expenses were subordinate to tax claims. In that year they were placed ahead of taxes. The costs and administrative expenses of a trustee were, however, still subordinate to claims of the referee or creditors for preserving or recovering assets. In 1952 the Act was amended to give priority to administrative expenses of an ensuing bankruptcy proceeding over unpaid administrative expenses of a superseded proceeding.
> We have then a progressive legislative development that (1) marks a decline in the grant of a tax preference to the United States and (2) marks an ascending priority for costs and expenses of administration."

In In re Tamasha Town and Country Club (9 CCA) 483 F(2d) 1377 (1973), the court ruled that post adjudication administration expenses were to be paid from a pre-adjudication deposit for priority tax claims. In its opinion (p.1380), the court points out that Randall did not turn on the presence or absence of a trust res, nor on the isolation of particular funds:

> "In Randall, the trustee argued that since the debtor in possession had failed to segregate the taxes withheld, no trust in favor of the United States resulted. (401 U.S. at 515, 91 S.Ct. 991.) Instead of adopting this argument, the Court chose to place its ruling on the survey of legislative developments favoring administrative expenses over tax claims and on the overriding policy of section 64(a), as discussed above."

II.

THE DECISION BELOW DOES NOT ERRONEOUSLY INFRINGE UPON VALID TRUST RIGHTS

Petitioner asserts that its beneficial rights to the tax account balance are infringed by the ruling of the court below. That decision, however, does no more than state that where assets derived from the estate and which ordinarily would be available to pay expenses of administration, are segregated but not disbursed during the bankruptcy proceeding, the segregation must be considered as having been made subject to payment of those expenses of administration.

This is wholly consistent with Tamasha, supra. It also comports with Randall where, on page 517 of the opinion, it is said:

> "We think the statutory policy of subordinating taxes to costs of administration would not be served by creating or enforcing trusts which eat up an estate, leaving little or nothing for creditors and Court officers whose goods and services created the assets." (Emphasis added)

Acceptance of this principle requires that it be implemented. To the extent that recognition of undisbursed segregated funds derived from the estate itself would prevent such implementation, such segregation must be set aside.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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Attorney for
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